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No. 00-175/No. 00-0028

In The

Supreme Court of the United States

WILLIAM I. KOCH, *et al.*,
Petitioners,

v.

KOCH INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the trial court's admission of evidence of other lawsuits brought by two of the plaintiffs was harmless error.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Plaintiffs-appellants below and Petitioners in No. 00-175 in this Court are: William I. Koch, Oxbow Energy, Inc., Spring Creek Art Foundation, Inc., Northern Trust Company, as trustee, Frederick R. Koch, and The Fiduciary Trust Company International ("The Oxbow Petitioners").

Plaintiffs-appellants below and Petitioners in No. 00-0028 in this Court are: L.B. Simmons Energy, Inc., d/b/a Rocket Oil Company, Gay A. Roane, Ann Alspaugh, Paul Anthony Andres Cox, Holly Antoinette Andres Cox Farabee, and Ronald W. Borders ("The Simmons Petitioners").

Also appearing as plaintiffs below were: United States Trust Company of New York, as trustee, Marjorie Simmons Gray, as trustee, Marjorie L. Simmons, as trustee, and Nationsbank, N.A., co-trustee of the Louis Howard Andres Cox Trusts B & D.

Defendants-appellees below and Respondents in this Court are: Koch Industries, Inc., Charles G. Koch, David H. Koch, Sterling V. Varner, Donald L. Cordes, and Thomas M. Carey.

Respondent Koch Industries, Inc. has no parent or subsidiary corporations that require disclosure under Supreme Court Rule 29.6.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners ask the Court to review the Tenth Circuit's finding that the district court committed harmless error, when, in the course of an eleven-week trial, the court admitted fleeting evidence concerning other lawsuits that two of the plaintiffs had filed. Respondents respectfully submit that review is inappropriate and unwarranted because, regardless of how one articulates the standard underlying the harmless error statute, the conclusion is inescapable that the evidence of other lawsuits "d[id] not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1994). Moreover, application of the standard espoused by the Petitioners -- that there be a high

probability of harmlessness -- would not change the result in this case, because a unanimous appeals court found that it was "extremely doubtful" that admission of the disputed evidence affected the jury's verdict. Oxbow Petition Appendix ("Pet. App.") A42. The appeals court also concluded that the trial court's overall handling of this "vast and complex piece of litigation" "achieved fundamental fairness." Pet. App. A64.

To undo the enormous undertaking of judge and jury here because of the isolated admission of immaterial testimony that "d[id] not affect the essential fairness of the trial" would be the very antithesis of what Congress intended in enacting the harmless error statute. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984). Accordingly, the Petitions should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 203 F.3d 1202 (Pet. App. A). The pertinent reported opinions of the United States District Court for the District of Kansas are at 2 F. Supp. 2d 1385 and 6 F. Supp. 2d 1207 (Pet. Apps. B and C) and at 37 F. Supp. 2d 1231. The pertinent unreported opinion of the District Court is at 1998 WL 975598 (Pet. App. D).

STATEMENT

The plaintiffs in this case were individual and organizational shareholders of Koch Industries, Inc. ("KII" or "the Company"), who sued the privately-held Company and some of its individual officers, alleging fraud in connection with the 1983 buyout of their interest in KII. Plaintiffs asserted claims

under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and claims under state law for breach of fiduciary duty, breach of warranty and fraud. Plaintiffs' primary contention was that defendants misrepresented or failed to disclose material facts that would have affected the sale price of plaintiffs' KII stock. Pet. App. A2, A5.

The litigation below spanned a period of fifteen years and culminated in a trial lasting nearly three months. Pet. App. A64. Discovery included the production of several hundred thousand pages of documents and more than 150 depositions. By the start of trial, the district court had generated more than 600 pages of written opinions, including a 337-page opinion that granted defendants summary judgment on nine of plaintiffs' twelve claims. *See generally Koch v. Koch Industries, Inc.*, 969 F. Supp. 1460 (D. Kan. 1997).

Prior to trial, plaintiffs filed eight motions in limine to exclude evidence. Pet. App. B2. One of these objected to introduction of evidence concerning other lawsuits filed by two of the plaintiffs, William and Frederick Koch, against their mother and/or brothers, defendants Charles and David Koch. The trial court found that the evidence was relevant and admissible to demonstrate, among other things, the state of Koch family relations around the time of the sale of stock and to show bias against the defendants. Pet. App. B10-14. A subsequent pretrial order precluded all parties from going into the merits of, or the evidence involved in, the other lawsuits. Pet. App. C10.

During trial, passing mention was made of the other suits in defendants' opening statement and during cross examination of William Koch. Trial Transcript ("Tr.") Vol. T1, pp. 354-55; Vol. T4, pp. 2721-24. No other evidence was

presented on the subject, and defendants made no reference to other lawsuits during closing arguments.[1]

William Koch was one of 40 fact and expert witnesses whose testimony was presented to the jury. His testimony on the other lawsuits comprised fewer than four pages of trial transcript; his entire testimony encompassed 968 pages. The entire trial transcript totaled 7,462 pages.

The jury also heard evidence establishing that plaintiffs had been advised in connection with their sale of KII stock by two Wall Street law firms and by the New York investment banking firm of Goldman Sachs & Company. Pet. App. A4.

At the close of trial, the court instructed the jurors on the elements of plaintiffs' claims, and required the jury to answer special interrogatories on each element of the claims. Tr. Vol. P4, pp. 3096-114. The court also gave a limiting instruction concerning the testimony pertaining to William's and Frederick's other lawsuits, directing the jury that such evidence could be considered only "on issues of the motives, intent, bias, and credibility of the parties," but could not be

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[1] In admitting the other-lawsuits evidence, the district court did not find that the lawsuits themselves were central to Respondents' defense, as Petitioners state. *See* Oxbow Pet. 4-5. Rather, the court stated that William Koch's "longstanding mistrust" and "animosity" toward defendants Charles and David Koch were "central to the defendants' case in several regards." Pet. App. B12. As discussed *infra*, Respondents' primary defense was that no material misrepresentations were made to plaintiffs and that plaintiffs received a fair price for their KII stock.

considered as evidence of whether the Koch plaintiffs were too litigious, whether their suits lack merit, or the propriety of the family's relationships with one another. Pet. App. A39. The court concluded the instruction with the following admonition:

> This case is not to be decided on the basis of passion or prejudice for or against any party but on the weight and credibility of the evidence on the essential elements of the claims and theories.

Tr. Vol. P4, p. 3195.

The jury returned a verdict in favor of defendants on all claims. Pet. App. A7. Pursuant to the special interrogatories, the jury specifically found that defendants made no material misrepresentations or omissions, and that plaintiffs were paid "a fair price" for their KII stock. Tr. Vol. P4, pp. 3097-98.[2]

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[2] In this regard, Petitioners present an incomplete record when they state that "the jury found that the defendants did in fact make misrepresentations and/or omissions" but "awarded no damages." Oxbow Pet. 5. The jury, in fact, found that any such misrepresentation or omission was not material. Tr. Vol. P4, pp. 3096-97. The plaintiffs failed even to meet their burden of showing that a misstatement or omission was made that "*might* materially affect the valuation of the stock." *Id.* (emphasis added). The jury additionally found that plaintiffs had failed to prove that they sold their shares for less than fair market value, and further, that defendants had proved by clear and convincing evidence that KII "paid a fair price for the plaintiffs' stock." *Id.* at pp. 3098; 3173-74.

Following trial, the district court issued a Memorandum and Order setting forth rulings on outstanding motions. The court concluded therein that "[h]ad the summary judgment record been the same as the trial record, none of the plaintiffs' claims would have survived summary judgment." *Koch v. Koch Industries, Inc.*, 37 F. Supp. 2d 1231, 1235 (D. Kan. 1998).

Plaintiffs appealed "a litany" of the district court's rulings to the Tenth Circuit, including its admission of evidence about the Koch plaintiffs' other lawsuits. Pet. App. A7. A unanimous panel affirmed the trial court on all 17 rulings challenged by plaintiffs, save two.[3] In particular, it affirmed the single summary judgment ruling challenged by plaintiffs on appeal. Pet. App. A8-17.

As to the evidentiary issue, the appeals court found that the trial court erred in admitting testimony about the other lawsuits because the evidence was irrelevant. Pet. App. A41-42.[4] In any event, the court held this error was harmless:

> Having reviewed the transcript of this trial, this court cannot reasonably conclude that the jury would have found for the Plaintiffs had it not learned of these other lawsuits. In the

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[3] The court held that the trial court had incorrectly instructed the jury on aspects of two claims under Texas law brought by three of the Simmons Petitioners. Pet. App. A48-52.

[4] For the cogent reasons stated by the district court, (*see* Pet. App. B10-14), Respondents respectfully disagree with the appeals court's conclusion that the evidence was wrongly admitted.

> context of this eleven week trial, it is extremely doubtful that the lone, brief colloquy between defense counsel and William about suing his brothers and mother and one passing mention of this evidence in the Defendants' opening statement caused the jury to find for the Defendants. Therefore, although the district court did err in admitting the disputed evidence, that error did not sufficiently prejudice the Plaintiffs to warrant reversal of the judgment.

Pet. App. A42.

In closing, the appeals court observed that in the context of litigation lasting a decade-and-a-half and a trial of nearly three months' duration, it could not reasonably expect perfection from the trial court, but that it was "satisfied that the district court achieved fundamental fairness in its presentation of this vast and complex piece of litigation to lay fact finders." Pet. App. A64.

REASONS FOR DENYING THE WRIT

1. Review Is Unwarranted Because Admission of the Evidence Was Harmless Error Under Any Formula.

Review by the Court is unwarranted because admission of the other-lawsuits evidence did not affect Petitioners' substantial rights. The testimony pertaining to other lawsuits related to only two of more than a dozen plaintiffs and accounted for no more than ten minutes of a complicated, eleven-week trial. The disputed evidence did not bear on any of the required elements of plaintiffs' claims. It was deemed by the appellate court to have been erroneously admitted because it was irrelevant, not because it was prejudicial. The evidence presented by plaintiffs in affirmative support of their claims, moreover, was so deficient as to cause the trial court to conclude that had it been aware of the record prior to trial, it would have granted summary judgment to defendants on all claims.

Most significantly, any improper influence that the other-lawsuits evidence might have had on the jury's deliberations was avoided by the trial court's instruction directing the jurors *not* to consider the testimony as evidence that plaintiffs tended to file lawsuits that lacked merit, and admonishing them to decide the case on the basis of evidence going to the essential elements of plaintiffs' claims, not on the basis of passion or prejudice. It is an "almost invariable assumption of the law that jurors follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), and the record contains persuasive evidence that they did so in this case. The jury made express findings against plaintiffs with respect to two elements essential to all four of their claims, namely, that

there were no material misstatements or omissions and that KII paid a fair price to plaintiffs for their stock. These findings necessarily defeated liability, regardless of the evidence on any other issue in the case. They also demonstrate that the jury was careful to focus on the requirements of each claim, as instructed, without regard to any conduct attributed to plaintiffs with respect to other litigation.

Viewing the other-lawsuits evidence in the context of the entire case, as a reviewing court must, "one can[] say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).

Petitioners nonetheless would assign fault to the appellate court for failing to employ the guidance set out in *Kotteakos* for harmless error analysis in criminal cases. In particular, the Simmons Petitioners assert that *Kotteakos* required the court of appeals to inquire whether it was "highly probable" that the error was harmless, (Simmons Pet. 7), while the Oxbow Petitioners assert that the appeals court should have used a "significant-possibility-of-harm" test, (Oxbow Pet. 6). Regardless of how the circuit court articulated the standard, however, it is clear from its analysis that the unanimous panel was "sure" in "the conviction . . . that the error did not influence the jury, or had but very slight effect, [and that] the verdict and the judgment should stand." *Kotteakos,* 328 U.S. at 764-65.

Specifically, the appeals court found that it was "*extremely doubtful*" that the few, brief references to William Koch suing his brothers and mother affected the jury's verdict. Pet. App. A42 (emphasis added). This is but another way of

stating that it was "highly probable" that the evidence was harmless, or that there was no "significant possibility of harm" flowing from the trial court's error. That statement, which Petitioners ignore in their briefs, establishes that the Tenth Circuit in fact found with "fair assurance" that the error was not harmful.

The harmless error statute itself does not mandate a specific quantum of probability as to whether an error affected the substantial rights of a party, but only that there be a finding that such rights were affected. 28 U.S.C. § 2111 (1994). Here, the appeals court described its obligation in terms that comport with the statute and with *Kotteakos*: "When a trial court erroneously receives evidence, this court will reverse the jury's verdict 'only if the error prejudicially affects a substantial right of a party.'" Pet. App. A42 (quoting *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998)). Upon review of the transcript of the trial, the appellate panel concluded that the "error did not sufficiently prejudice the Plaintiffs to warrant reversal of the judgment." *Id.*

2. This Case Is Not an Appropriate Vehicle for Addressing the Harmless Error Standard in Civil Cases.

Petitioners contend that this case presents a "rare" and "opportune" vehicle for the Court to resolve a purported inter-circuit conflict concerning the appropriate standard to apply to harmless error in civil cases. Oxbow Pet. 1, 6. As discussed at Part 3 *infra*, the various expressions of appellate courts on this issue are not in need of reconciliation. In any event, this case does not "squarely and meaningfully" present the "split" among the circuits concerning the probability standard for harmless error in civil cases, (Oxbow Pet. 15),

because the court of appeals found that it was "extremely doubtful" that the error affected the jury's judgment. Pet. App. A42. Accordingly, had the appeals court applied what Petitioners describe as the "majority" rule and imposed a "highly probable" standard, the result would be unchanged.

Indeed, any so-called majority court would have concluded as the Tenth Circuit did that the other-lawsuits evidence was harmless because, with respect to the erroneous admission of evidence, "majority" and "minority" circuits alike look to the same factors that are determinative here: whether the evidence was relevant to a primary or central issue in the case;[5] whether the evidence was a small part of the total evidence adduced at trial;[6] whether there was ample other evidence on an issue or claim;[7] whether the erroneously admitted evidence was argued to the jury in closing argu-

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[5] *See, e.g., ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 549-50 (Fed. Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 789 (1st Cir. 1996); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988); *Lataille v. Ponte*, 754 F.2d 33, 37-38 (1st Cir. 1985); *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983).

[6] *Ahern*, 85 F.3d at 791; *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132 (8th Cir. 1994); *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1239 (5th Cir. 1982).

[7] *ATD Corp.*, 159 F.3d at 549-50; *Buchanna v. Diehl Mach., Inc.*, 98 F.3d 366, 372 (8th Cir. 1996); *Schrand*, 851 F.2d at 157; *Longoria v. Wilson*, 730 F.2d 300, 305 (5th Cir. 1984); *Pregeant v. Pan Am. World Airways, Inc.*, 762 F.2d 1245, 1249 (5th Cir. 1985); *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 243 (3d Cir. 1983).

ments;[8] whether any potential harm was cured by a limiting instruction or special verdict form;[9] and whether the jury's verdict could have been any different had the evidence not been admitted.[10] Therefore, application of the so-called majority rule would not yield any different result.

Nor does this case present any of the questions concerning the burden of persuasion in harmless error cases that Petitioners seek to press here. *See* Simmons Pet. 5; Oxbow Pet. 9 n. 4. The court of appeals did not even discuss which party had the burden of persuasion, because it had no need to do so. *See Barth v. Gelb*, 2 F.3d 1180, 1189 (D.C. Cir. 1993). The evidence concerning harm was not in equipoise, and the reviewing court was not in "grave doubt" as to the harmlessness of the evidence. *Cf. O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Because the record

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[8] *Rabon*, 672 F.2d at 1239.

[9] *ATD Corp.*, 159 F.3d at 549-50; *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1989); *Aetna Cas. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1160 (11th Cir. 1986); *Lionti*, 709 F.2d at 243. *Cf. Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1024 (D.C. Cir. 1990) (erroneous jury instruction found harmless where the trial court's use of special verdict forms made it "easy to ascertain that the erroneous . . . instruction could not have influenced" the verdict).

[10] *ATD Corp.*, 159 F.3d at 550; *Ahern*, 85 F.3d at 789; *Paul v. Farmland Indus., Inc.*, 37 F.3d 1274, 1277 (8th Cir. 1994). *Cf. Williams*, 920 F.2d at 1024-25.

regarding harmlessness did not present a close question, burdens of persuasion are of no moment here.[11]

Likewise, the fact that this litigation involves "tremendous financial stakes" and that both sides are "well-represented by experienced counsel," (Oxbow Pet. 14), does not distinguish it from numerous others.[12] Further, the figures provided by Petitioners regarding the frequency of civil cases raising harmless error disputes suggest that opportunities to address this issue are commonplace, not rare. Petitioners identified 671 civil cases undertaking harmless error analysis since 1999. Oxbow Pet. 13. Our research found that the four circuits characterized by the Oxbow Petitioners as "minority" circuits have decided at least 200 harmless error disputes in civil cases since 1983, when the Ninth Circuit first articulated the "more-probable-than-not" formula in *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). Thus, if there were a need to refine the harmless error standard in

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[11] For this and other reasons, this case is not a suitable medium through which to address Petitioners' concerns that the purported split in the circuits regarding harmless error in civil cases has persisted "even after this Court's decision in *O'Neal*." Oxbow Pet. 10. In *O'Neal*, a habeas case, the Court took pains to limit its holding to the "special circumstance" when a court "(1) reviews a state-court judgment from a criminal trial, (2) finds a constitutional error, and (3) is in grave doubt about whether or not that error is harmless." 513 U.S. at 435. None of these factors is present here.

[12] We note in this regard that while Petitioners' state that "[a]s much as $2 billion is at stake" in the litigation, (Oxbow Pet. 3), in fact, 75% of plaintiffs' claims were dismissed on summary judgment, and the prayer for relief submitted to the jury was reduced accordingly.

civil cases, there have been and will be other, better, opportunities to do so.

3. A Variety of Formulations Are Permissible for Determining Harmless Error in Civil Cases.

Petitioners' claim of an intractable split among circuits on the issue of harmless error in civil cases is not borne out upon examination of the cases. In practical application of harmless error analysis to evidentiary errors in particular, so-called minority and majority circuits often resemble each other. Petitioners also fail to demonstrate why the existence of a variety of articulations of the harmless error standard is intolerable in civil cases where constitutional error is not at issue.

In reality, the circuit courts do not fall crisply into two camps, as Petitioners suggest, but have variously stated the required standard of proof. *Renz v. Grey Adver. Inc.*, 135 F.3d 217, 223-24 (2d Cir. 1997). While a majority of circuits hold that *Kotteakos* should govern harmless error analysis in civil cases, these courts do not all formulate the *Kotteakos* standard in terms of high probability of harmlessness.[13]

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[13] *Compare McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985) (errors are not harmless unless it is "highly probable" that they did *not* affect a party's rights); *with Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (in assessing whether evidentiary error was harmless, the reviewing court "need only be able to say 'with fair assurance . . . that the judgment was not substantially swayed by the error[s]'") (citations omitted); *cert. denied*, 120 S. Ct. 1243 (2000); *and Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988) (harmless error inquiry "involves an assessment of the

(continued...)

In actual operation of the harmless error rule, moreover, the purported conflict among the circuits is "more semantic than real." *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000). For example, as discussed above, both "majority" and "minority" courts assess the impact of evidentiary errors based on the same factors. The commonality of these factors yields reliably uniform results irrespective of the precise formulation of the standard for harmless error in civil cases. Thus, the need for a rigid standard is far from compelling.

Furthermore, while Petitioners stress that the harmless error statute makes no distinction between civil and criminal cases, the Court has observed that "this does not mean that the same criteria shall always be applied regardless of this difference." *Kotteakos*, 328 U.S. at 762. Congress enacted a single statute applicable to both criminal and civil matters, but "[i]t did not require the same judgment in [a criminal case] as in one involving only some question of civil liability." *Id.* at 763.

Kotteakos in fact eschewed fixed formulas in favor of an analysis of the totality of the circumstances:

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[13] (...continued)
likelihood that the error affected the outcome of the case . . . . '[I]f one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'") (quoting *Kotteakos v. United States*, 328 U.S. at 750, 765 (1946)) (emphasis added); *United States v. Killough*, 848 F.2d 1523, 1527 (11th Cir. 1988) ("[o]nly if an error prejudiced a substantial right of a defendant may a court of appeals reverse"; "[w]hether an error is harmless or prejudicial depends on the facts of each case").

> In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

328 U.S. at 762 (citations omitted). *Kotteakos* indeed recognized that application of the harmless error statute required "discrimination [and] judgment transcending confinement by formula or precise rule." *Id.* at 761. The Tenth Circuit here exercised judgment and undertook the kind of fact-specific analysis of the entire case that the Court endorsed in *Kotteakos*, and there is no need to review, or to reverse, its conclusion here.

CONCLUSION

For the foregoing reasons, the Petitions for writ of certiorari should be denied.

Respectfully submitted,

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